



Steven Ray Santana was convicted after a jury trial of murder.<sup>1</sup> Santana asserts on appeal: 1) the prosecutor failed to disclose a witness might have received benefits for testifying against Santana; 2) the trial court erred in instructing the jury on transferred intent; and 3) his sentence was inappropriate in light of his character and offense. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

At approximately 3:00 p.m. on Saturday, July 1, 2006, Luis Ortiz met his friend, Rudolph Swisher, while both were riding bicycles in their East Chicago neighborhood. Ortiz was a member of the Latin Kings gang. Both Ortiz and Swisher were wearing red shirts and had similar hair. While riding, they saw Santana. Ortiz knew Santana was a member of a rival gang, the Imperial Gangsters. As Santana reached under his shirt, he motioned for Ortiz and Swisher to approach him. They rode away from Santana in different directions.

Later that evening, Victor Madero came to Ortiz's home. Madero was a member of the Latin Kings. Ortiz told Madero of the earlier encounter with Santana. They went to Madero's house. While they were sitting on Madero's porch, Swisher and his girlfriend rode by on a bicycle. They talked and agreed to meet at Ortiz's house after Swisher dropped off his girlfriend. Ortiz and Madero returned to Ortiz's house.

At approximately 8:00 p.m. Juan Guardiola stopped by Ortiz's house but did not stay. Guardiola was associated with the Latin Kings but was not a member. Shortly

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<sup>1</sup> Ind. Code § 35-42-1-1.

thereafter, Madero pointed out a person dressed in black pants, a black hoodie, and black shoes lurking in the shadows of a nearby alley. Ortiz recognized the person as Santana.<sup>2</sup> At that same time, Ortiz and Madero noticed Swisher riding his bicycle toward Ortiz's house. Santana came out of the alley and approached Swisher from behind. Santana shot Swisher several times from close range. Swisher fell from his bicycle, and Santana fled. Ortiz ran out to Swisher in the street even as Santana fired additional shots at the house. Swisher had been shot four times in the back and died from his wounds.

Ortiz and Madero were questioned by the police but denied seeing anything. Three days later, they were arrested for pointing a gun at Santana's mother and stepfather. Ortiz told the police Santana killed Swisher. The police arrested Santana and seized black clothing and other items from his home. A pair of Santana's black pants tested positive for blood, but the amount was insufficient to permit a DNA test.

On July 7, 2006, the State charged Santana with murder. A jury trial commenced on July 23, 2007. The State tendered a final jury instruction on transferred intent, and the court gave a pattern instruction on transferred intent over Santana's objection. The jury returned a guilty verdict.

Ten days after Santana's trial, the State entered into a plea agreement with Ortiz for the charges related to pointing a gun at Santana's mother and stepfather. Two days before his sentencing hearing, Santana moved to correct error claiming Ortiz and the

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<sup>2</sup> While walking home from Ortiz's house, Guardiola ran into Santana and an unidentified man. Guardiola testified Santana was dressed in all black and wearing a hoodie. Guardiola became alarmed and ran home. Five or ten minutes later, he called Ortiz and learned Swisher was dead.

prosecution misrepresented whether Ortiz was testifying in return for leniency. The motion to correct error was denied. At sentencing, the court found three aggravating circumstances: 1) Santana had recently violated probation in two other cases; 2) Santana had a criminal history; and 3) because of prior probation failures, Santana was in need of correctional and rehabilitative treatment in a penal facility. The court found no mitigating circumstances. Santana was sentenced to sixty-two years imprisonment.

## **DISCUSSION AND DECISION**

### **1. Prosecutorial Misconduct**

Santana's claim of prosecutorial misconduct was not preserved for appellate review, so he asserts it was fundamental error. To demonstrate fundamental error, Santana "must establish not only the grounds for the misconduct but also the additional grounds for fundamental error." *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). Those "additional grounds" are that the misconduct made a fair trial impossible or amounted to blatant violations of basic principles of due process that presented a substantial potential for harm. *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002). To review the "grounds for the misconduct" we determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed Santana in a position of grave peril to which he or she should not have been subjected. *Cooper*, 854 N.E.2d at 835.

Santana asserts misconduct because the prosecutor did not inform the jury that Ortiz might receive benefits as a result of his testimony. Ortiz had charges pending, but

he denied he was promised leniency in return for his testimony. The prosecutor indicated there was no plea agreement or promise made in exchange for Ortiz's testimony.

Prosecutors must fully disclose all "express plea agreements or understandings between the State and witnesses, even where such agreements or understandings are not reduced to writing." *Goodner v. State*, 714 N.E.2d 638, 642 (Ind. 1999) (citations omitted). Failure to disclose such agreements is misconduct and requires a new trial. *Id.* But the duty to disclose arises only when there is a "confirmed promise." *Wisehart v. State*, 693 N.E.2d 23, 57 (Ind. 1998), *reh'g denied, cert. denied* 526 U.S. 1040 (1999). There is no confirmed promise "if a witness testifies in the hope of leniency, and the State neither confirms nor denies leniency to the witness." *Seketa v. State*, 817 N.E.2d 690, 694 (Ind. Ct. App. 2004).

Ortiz entered into a plea agreement with the State ten days after Santana's trial concluded, but Santana has not shown there was a confirmed promise at the time of trial. Even if Ortiz's plea agreement was the result of his testimony at Santana's trial, Santana has not demonstrated the State made promises to Ortiz before he testified. As such, Santana is unable to demonstrate prosecutorial misconduct or fundamental error.

## 2. Jury Instructions on Transferred Intent

Santana asserts the trial court erred in instructing the jury on transferred intent. Jury instructions are within the sound discretion of the trial court and will be reviewed only for an abuse of discretion. *Snell v. State*, 866 N.E.2d 392, 395 (Ind. Ct. App. 2007).

The State argues Santana waived this issue because he did not comply with Ind. Appellate Rule 46(A)(8)(e): "Where error is predicated on the giving or refusing of any

instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto.” Ordinarily, failure to comply with this appellate rule waives the issue. *See Reed v. State*, 702 N.E.2d 685, 689-90 (Ind. 1998). Santana did not include the verbatim objections made to the instruction in his brief or appendix and has accordingly waived this issue for appeal.<sup>3</sup>

Waiver notwithstanding, the transferred intent instruction was not error. The trial court gave the following instruction over Santana’s objection:

If one intends to injure or kill a person with a deadly weapon, and by mistake or inadvertence injures or kills another person with such weapon, his intent is transferred from the person to whom it was directed to the person actually injured, and he may be found guilty of murder. You may find a person guilty of murder even if that person intended to kill another.

(Tr. at 906.) When reviewing a decision whether to give a jury instruction, we consider:

1) whether the instruction correctly states the law; 2) whether there is evidence in the record to support the giving of the instruction; and 3) whether the substance of the instruction is covered by other instructions given. *Corbett v. State*, 764 N.E.2d 622, 629 (Ind. 2002). Santana asserts the evidence at trial did not support the instruction.

Ortiz and Santana were members of rival gangs. When Ortiz encountered Santana the day of the shooting, Ortiz was wearing a red shirt and riding a bicycle. When

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<sup>3</sup> The State also argues Santana waived this issue by failing to raise a specific objection to the transferred intent instruction. He did not. Objections to jury instructions “must be made with sufficient specificity to make the trial court aware of any alleged error,” *Gentry v. State*, 835 N.E.2d 569, 576 (Ind. Ct. App. 2005). Santana’s attorney asked for “facts regarding testimony that the State is relying on for that transferred intent.” (Tr. at 825.) After the State recited its basis for the instruction, the court asked Santana’s attorney if he objected, and Santana did object. Santana’s objection was sufficiently specific.

Swisher was shot later that evening, he was near Ortiz's home, wearing a red shirt, and riding a bicycle. He and Ortiz had similar hair. Evidence that has some probative value is sufficient to support the giving of an instruction, even if the evidence is weak or inconsistent. *See Snell*, 866 N.E.2d at 396. The evidence before us supports a jury instruction on transferred intent. Accordingly, the trial court did not err in so instructing the jury.

3. Inappropriate Sentence

Santana asserts his sentence was inappropriate in light of his character and the nature of his offense. He asks us to vacate the sentence or, in the alternative, revise it to the advisory sentence of fifty-five years.

Subject to the review and revise power of App. R. 7(B),<sup>4</sup> sentencing decisions are reviewed for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g on other grounds* 875 N.E.2d 218 (Ind. 2007). There is an abuse of discretion if the decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). We exercise deference to a trial court's sentencing decision, “both because Rule 7(B) requires us to give ‘due consideration’ to that decision and because we understand and recognize

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<sup>4</sup> Rule 7(B) permits us to “revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.”

the unique perspective a trial court brings to its sentencing decisions.” *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007).

In *Anglemeyer*, our Supreme Court explained the review and revise power under App. R. 7(B):

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. This appellate authority is implemented through Appellate Rule 7(B), which provides that the Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.

868 N.E.2d at 491 (citations omitted).

Regarding the nature of the offense, Santana hid in the shadows of an alley while waiting for his victim. This is an aggravating circumstance that would allow the State to seek the death penalty or life imprisonment without parole. *See* Ind. Code § 35-50-2-9(b)(3). He was wearing dark clothes, including a hooded sweatshirt, even though it was mid-summer. He shot a fifteen-year-old boy four times in the back and the shooting was gang-related. The nature of the offense does not lead us to believe Santana’s sentence is inappropriate.

Regarding Santana’s character, Santana has a criminal record including a Florida misdemeanor conviction of petit theft of \$100 or more and an Indiana misdemeanor



conviction of operating while intoxicated. Santana had active warrants in Florida for petit theft, domestic violation injunction, and battery (domestic violence) when he shot Swisher, and he was on probation. Santana admitted to a long history of drug use. All of these reflect poorly on his character.

At sentencing, the court found three aggravating circumstances: 1) Santana had recently violated his probation in two separate cases; 2) Santana had a criminal history; and 3) because of prior probation failures, Santana was in need of correctional and rehabilitative treatment in a penal facility. The court found no mitigating factors.

Santana's character coupled with the nature of his offense justifies a sentence greater than the advisory. We accordingly find the trial court did not abuse its discretion in sentencing Santana.

Affirmed.

MATHIAS, J., and VAIDIK, J., concur.